

No. 16515 ✓

United States
Court of Appeals
for the Ninth Circuit

A. J. BUMB, Trustee in Bankruptcy of the Es-
tate of Ampco Products of California, Inc.,
Bankrupt,

Appellant,

vs.

L. E. McINTYRE and M. H. McINTYRE, Doing
Business as L. E. McIntyre & Co.,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

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PAUL P. O'BRIEN, CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer of McIntyres to Counterclaim.....	12
Answer to Petition and Counterclaim by Trustee	7
Attorneys, Names and Addresses of.....	1
Certificate by the Clerk.....	63
Findings of Fact, Conclusions of Law and Order Re Chattel Mortgage.....	14
Notice of Appeal.....	30
Order Affirming Referee's Decision Re Chattel Mortgage	28
Order to Show Cause.....	5
Petition for Order to Show Cause.....	3
Petition for Review of Referee's Order.....	20
Referee's Certificate Amending Referee's Certificate on Petition for Review of Order Re Chattel Mortgage	27
Referee's Certificate on Petition for Review of Order Re Chattel Mortgage.....	23
Statement of Points on Appeal, Appellant's..	31

INDEX

PAGE

Transcript of Proceedings.....	33
--------------------------------	----

Witnesses:

Browning, Gary

—direct	41
—cross	44
—redirect	49

McIntyre, L. E.

—direct	50
—recross	51

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

SHUTAN and FEINERMAN,
ROBERT H. SHUTAN,
433 So. Beverly Drive,
Beverly Hills, California.

For Appellee:

FORSTER & GEMMILL,
JOHN G. GEMMILL,
ROBERT L. FARMER,
ROBERT L. MEYER,
DONALD W. CROCKER,
530 Statler Center,
900 Wilshire Boulevard,
Los Angeles 17, California.

In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy—No. 82,754—T

In the Matter of

AMPSCO PRODUCTS OF CALIFORNIA, INC.,

Bankrupt.

PETITION FOR ORDER TO SHOW CAUSE

To the Honorable Benno M. Brink, Referee in Bankruptcy:

Petitioners L. E. McIntyre and M. H. McIntyre, Co-Partners doing business under the fictitious firm name and style of L. E. McIntyre & Company, respectfully show as follows:

I.

Prior to the filing of the Involuntary Petition for Bankruptcy in this proceeding, petitioners filed an action in the Superior Court of the State of California, in and for the County of Los Angeles, against Ampsco Products of California, Inc., and other named defendants, entitled "L. E. McIntyre and M. H. McIntyre, Co-Partners doing business under the fictitious firm name and style of L. E. McIntyre & Company, Plaintiffs, vs. Ampsco Products of California, Inc., a California Corporation, et al., Defendants," No. 688141. Said action seeks recovery upon a Promissory Note secured by a Mortgage of Chattels. Attached hereto, marked Ex-

hibit A, and by reference made a part hereof, is a full, true, and correct copy of the said Note and Mortgage of Chattels, which was recorded on June 14, 1956, in Book [2*] 51460, Page 320, Official Records of Los Angeles County, California.

II.

It will be noted that the said Note is executed by Ampsco Products of California, Inc., which is now the Bankrupt herein, and by other parties. Petitioners must maintain the said action in order to preserve their rights as against the said other parties, and a determination of the validity of the Mortgage of Chattels, as between Petitioners and the Trustee in Bankruptcy herein, is essential to a determination of the ultimate rights of petitioners, as against the said other parties.

III.

Petitioners represent that a multiplicity of proceedings would be avoided if a determination of the validity of the Mortgage of Chattels were to be made in the said action by the said Superior Court. The determination of the validity of the Mortgage of Chattels must be made according to California law, and the convenience of all parties, including the Trustee herein, would be served by an adjudication of that forum.

Wherefore, Petitioners pray that this Court issue an Order to Show Cause, directed to A. J. Bumb,

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Trustee herein, requiring him to show cause, at a time to be fixed by the Court, why he should not be required to cause himself to be substituted as a party defendant in place and instead of Ampsco Products of California, Inc., in the said Superior Court action, requiring that the said Trustee appear and defend the said action, and why an Order should not be made herein that the determination of the Superior Court in the said action as to the validity, or non-validity, of the said Mortgage of Chattels shall be binding in these proceedings, and that, if the said Superior Court determines the Mortgage of Chattels to be valid, a preferred lien, to the extent of the said Mortgage of Chattels, shall bind the proceeds of the sale of any property which the said Superior Court shall determine to have been subject to the said [3] Mortgage of Chattels.

Dated this 15th day of January, 1958.

FORSTER & GEMMILL,

By /s/ JOHN G. GEMMILL,

Attorneys for Petitioners.

[Endorsed]: Filed Jan. 16, 1958, Referee. [4]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

The Court having read the Petition for Order to Show Cause filed herein on behalf of L. E. McIn-

tyre and M. H. McIntyre, d/b/a L. E. McIntyre & Company,

It Is Hereby Ordered that A. J. Bumb, Trustee in Bankruptcy herein, is hereby ordered to appear before this Court on January 30, 1958, at the hour of 10:00 o'clock a.m., then and there to show cause, if any there be, why this Court should not make the following Order:

That A. J. Bumb as Trustee in Bankruptcy herein, be required to cause himself to be substituted as a party defendant in place and instead of Ampsco Products of California, Inc., in the action pending in the Superior Court in and for the County of Los Angeles, State of California, entitled "L. E. McIntyre and M. H. McIntyre, Co-Partners doing business under the Fictitious Firm Name and Style of L. E. McIntyre & Company, Plaintiffs, vs. Ampsco Products of California, Inc., a California corporation, [6] et al., Defendants," No. 688141, and requiring that the said Trustee appear and defend the said action on behalf of the Bankruptcy Estate;

That the determination of the Superior Court in the said action, as to the validity, or non-validity, of the said Mortgage of Chattels, shall be binding in these proceedings;

That if the said Superior Court determines the Mortgage of Chattels to be valid, a preferred lien, to the extent of the said Mortgage of Chattels, shall bind the proceeds of any sale of any property which

the said Superior Court shall determine to have been subject to the said Mortgage of Chattels.

It Is Further Ordered that this Order to Show Cause, together with a copy of the Petition upon which it is based, be served upon the said Trustee, or his attorney, by mail, not later than five (5) days before the date of the hearing hereon.

Dated this 16th day of January, 1958.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed Jan. 16, 1958, Referee. [7]

[Title of District Court and Cause.]

ANSWER TO PETITION AND COUNTER-
CLAIM OF TRUSTEE FOR ORDER DE-
CLARING CHATTEL MORTGAGE NULL
AND VOID

ANSWER

Comes now A. J. Bumb and by way of answer to the Petition of L. E. McIntyre and M. H. McIntyre, Co-Partners d/b/a L. E. McIntyre & Company, filed January 16th, 1958, admits, denies and alleges as follows:

I.

Your respondent alleges that the assets of the bankrupt are all in the actual or constructive possession of your Trustee.

II.

That your Trustee cannot, from a reading of the alleged chattel mortgage, determine with any particularity whatsoever what assets of the bankrupt corporation are allegedly subject to the chattel mortgage. Your Trustee further alleges, however, based upon information and belief, that all of the physical assets of the bankrupt corporation were sold prior to the commencement of these bankruptcy proceedings, by the Assignee for the benefit of creditors of said corporation and that the net proceeds of said sale [8] are in the process of being transmitted to your Trustee, without any adverse claim being asserted thereto by said Assignee for the benefit of creditors.

III.

That your Trustee denies the validity of the subject chattel mortgage, and in that connection, therefore, admits that a determination of the validity of said chattel mortgage is proper and essential.

IV.

Your Trustee does not consent to be substituted as a party defendant in the place and stead of Ampsco Products of California, Inc., in the said Superior Court action. Your Trustee alleges that it would be contrary to the interest of this estate, involving unnecessary litigation and unnecessary expense to require your Trustee to appear in and defend said Superior Court action.

V.

Your Trustee alleges that this Court, the Court in which the within bankruptcy proceedings are pending, has the exclusive jurisdiction to control the administration of this bankrupt estate and is the proper Court to try and determine the validity of all claims and liens relating to the assets of the bankrupt.

Counterclaim

By way of counterclaim respondent A. J. Bumb respectfully alleges:

I.

That he is the duly elected, qualified and acting Trustee in bankruptcy of the above-named bankrupt estate.

II.

That among the assets belonging to the estate of said bankrupt are cash funds resulting from the sale, held prior to the commencement of these bankruptcy proceedings, by Ralph Meyer as [9] Assignee for the benefit of creditors of this bankrupt, of the physical personal property of the bankrupt which had been in the possession of and used by the bankrupt in the operation of its business prior to the execution of said assignment for the benefit of creditors on or about August 19th, 1957.

III.

That the petitioners herein, L. E. McIntyre and M. H. McIntyre, Co-Partners doing business under the fictitious firm name and style of L. E. McIntyre

& Company, claim to have a lien upon assets of the bankrupt estate by virtue of a mortgage of chattels bearing date of May 25th, 1956, a copy of which mortgage of chattels is attached as Exhibit A to the petition herein.

IV.

That said chattel mortgage is, under the laws of the State of California, invalid and of no effect whatsoever for the following reasons:

1. That said mortgagee failed to comply with the requirements of the law as pertaining to publishing notice of intention to execute a chattel mortgage, no such notice having been filed prior to the execution and recordation of such chattel mortgage, and

2. That there was undue and unreasonable delay in the recordation of such chattel mortgage, which delay was detrimental to creditors of the bankrupt, in that the chattel mortgage dated May 25th, 1956, was not filed for recordation until June 14th, 1956, and

3. The attempted description of the property to be subject to said chattel mortgage, as set forth in said mortgage, is legally inadequate as it is not sufficient and definite enough to identify the items of personal property which are subject to such chattel mortgage. [10]

There are creditors of the bankrupt now in existence who were creditors at the time of and prior to the recordation of said chattel mortgage.

Wherefore your Trustee as respondent and counterclaimant prays as follows:

1. That the petition herein be denied.

2. That this Court make and enter its Order declaring the above-described chattel mortgage null and void and that this Court enter a further Order that petitioners L. E. McIntyre and M. H. McIntyre and L. E. McIntyre & Company, a co-partnership, have no interest whatsoever in the assets of this bankrupt estate or the proceeds thereof, except that said petitioners may file a general unsecured claim in this bankruptcy proceeding for the amount claimed by them, this being without prejudice to the rights of the Trustee herein to examine such claim and to object thereto if it appears that objection is proper.

Dated: January 31st, 1958.

/s/ A. J. BUMB,
Trustee.

SHUTAN and FEINERMAN,

By /s/ ROBERT H. SHUTAN,
Attorneys for Trustee.

Duly verified.

[Endorsed:] Filed Feb. 1, 1958, Referee. [11]

[Title of District Court and Cause.]

ANSWER OF L. E. McINTYRE AND
M. H. McINTYRE TO COUNTERCLAIM

Come now L. E. McIntyre and M. H. McIntyre, Co-Partners doing business under the fictitious firm name and style of L. E. McIntyre & Company, and answer the Counterclaim of the Trustee herein, by which said Counterclaim the Trustee requests an Order declaring the Chattel Mortgage null and void, by admitting, denying, and alleging as follows:

I.

Answering Paragraph III of the said Counterclaim, L. E. McIntyre and M. H. McIntyre admit that they claim to have a lien upon the assets of the Bankrupt Estate, and affirmatively allege that they have such a lien by virtue of the Mortgage of Chattels bearing date of May 25, 1956, a copy of which is attached as Exhibit A to the Petition for Order to Show Cause on file herein.

II.

Answering Paragraph IV, L. E. McIntyre and M. H. McIntyre deny generally and specifically each and every allegation therein contained, and affirmatively allege as follows: [13]

(1) A Notice of Intended Mortgage was published and recorded, as required by Section 3440.1 of the Civil Code of the State of California in con-

nection with the execution of the said Mortgage, and the payment of the proceeds to the Bankrupt;

(2) There was no undue or unreasonable delay in the recordation of the said Chattel Mortgage. The said Chattel Mortgage was executed and delivered through an Escrow at Security-First National Bank of Los Angeles, Broadway and Florence Branch, Escrow No. 129-5912, under which publication and recordation, under the provisions of Civil Code Section 3440.1, were had, and the said Chattel Mortgage was recorded pursuant to the said Notice under said Section 3440.1. This is the reason that the Mortgage was dated May 25, 1956, and was recorded June 14, 1956;

(3) The description of the property subject to the Chattel Mortgage, as set forth therein, is a sufficient description under the laws of the State of California;

(4) None of the amounts owing by Ampsco Products of California, Inc., to creditors as of the date of the said Chattel Mortgage, and as of the date of the recording thereof, were owing to creditors of the Bankrupt at the time of the adjudication of bankruptcy herein.

Wherefore, L. E. McIntyre and M. H. McIntyre pray that this Court declare the Chattel Mortgage to be valid, and declare that the said parties have a first and prior lien upon the funds of the Bankrupt Estate resulting from the sale of the property covered by the Chattel Mortgage, to the extent of

the balance due thereon, which said balance is hereby alleged to be \$17,474.02, together with attorneys' fees in the sum of 10% thereof, as provided in the said [14] Chattel Mortgage, or \$1,747.40.

Dated February 12, 1958.

FORSTER & GEMMILL,

By /s/ JOHN G. GEMMILL,

Attorneys for L. E. McIntyre
and M. H. McIntyre.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 13, 1958. [15]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW, AND ORDER, RE CHATTEL
MORTGAGE

The Petition for Order to Show Cause filed herein by L. E. McIntyre and M. H. McIntyre, Co-Partners doing business under the fictitious firm name and style of L. E. McIntyre & Company, the Order to Show cause issued thereon, dated January 16, 1958, the Answer to Petition and Counterclaim of Trustee on file herein, the Answer of L. E. McIntyre and M. H. McIntyre, Co-Partners doing business under the fictitious firm name and style of L. E. McIntyre & Company, to the said Counterclaim, and the Order to Show Cause herein directed to L.

E. McIntyre and M. H. McIntyre, d/b/a L. E. McIntyre & Company, and Harvey Aikins, Mrs. Harvey Aikins, John E. Brodbeck, Mrs. John E. Brodbeck, and Security-First National Bank of Los Angeles, having come on regularly for hearing on March 10, 1958, before Honorable Benno M. Brink, Referee in Bankruptcy, and the Trustee appearing through his attorneys, Messrs. Shutan and Feinerman, by Robert H. Shutan, Esq., and Milton Feinerman, Esq., and L. E. McIntyre and M. H. McIntyre, d/b/a L. E. McIntyre & Company, appearing through their attorneys, Messrs. Forster & Gemmill, by John G. Gemmill, Esq., [17] Harvey Aikins and Mrs. Harvey Aikins appearing through their attorney, Sigfried Levitt, Esq., connected with the office of Bernard D. Flaxman, Esq., Security-First National Bank of Los Angeles appearing through its attorney, G. H. Banta, Esq., and John E. Brodbeck and Mrs. John E. Brodbeck having failed to appear, but proof of service of the said Order to Show Cause having been filed herein, and the Court having received documentary evidence and having heard oral testimony, and certain stipulations of fact having been entered into in open Court and in writing between counsel for the respective parties, and the Court having decided the matter in favor of L. E. McIntyre and M. H. McIntyre, Co-Partners doing business under the fictitious firm name and style of L. E. McIntyre & Company, the Court makes the following

Findings of Fact

1. For a valuable consideration, the Bankrupt, Ampsco Products of California, Inc., and Harvey Aikins, Mrs. Harvey Aikins, John E. Brodbeck and Mrs. John E. Brodbeck executed and delivered to L. E. McIntyre & Company that certain Promissory Note dated May 25, 1956, in the principal amount of \$27,500.00, and, as security therefor, the same parties executed and delivered to L. E. McIntyre & Company that certain Mortgage of Chattels dated May 25, 1956, which said Mortgage of Chattels was acknowledged under date of June 8, 1956, and was recorded on June 14, 1956, in Book 51460, Page 320, Official Records of Los Angeles County, California. Full, true, and correct copies of the said Note and of the said Mortgage of Chattels are attached to the Petition for Order to Show Cause filed herein on behalf of L. E. McIntyre and M. H. McIntyre on January 16, 1958, and the same are hereby incorporated herein by reference.

2. The said Note and Chattel Mortgage were executed and delivered through an escrow at Security-First National Bank of Los Angeles, Broadway and Florence Branch, Escrow No. 129-5912. A Notice of Intended Mortgage with respect to the said Mortgage of Chattels [18] was executed, recorded, and published, as required by California law, through the said escrow.

3. The Notice of Intended Mortgage, which is in evidence herein, states that the same was to be de-

livered, and the consideration was to be paid, at 10:00 o'clock a.m. on June 12, 1956, at the place where the said escrow was held.

4. There was no unreasonable delay in the recordation of said Mortgage of Chattels.

5. Inventories describing in detail the property covered by the Mortgage of Chattels were initialed on behalf of the Mortgagor and Mortgagee, and were deposited in said escrow; but such Inventories were not attached to or made a part of said Mortgage. The said Inventories describe the fixtures, Machinery and tooling equipment owned by the Bankrupt located at 224 East Palmer Avenue, Compton, California.

6. The description of the property contained in the said Mortgage of Chattels, as recorded, is sufficiently definite to enable third parties, aided by inquiries which the instrument itself suggests, to identify the property covered thereby.

7. Pursuant to the written Stipulation on file herein between the Trustee and L. E. McIntyre & Company, through their respective attorneys, the Court finds that the proceeds of sale (by Ralph Meyer, as Assignee for the Benefit of Creditors herein) of the furniture, fixtures and tooling equipment of the Bankrupt located at 224 East Palmer Avenue, Compton, California, was \$28,775.00, and that the unpaid principal balance on the Note secured by said Chattel Mortgage is \$17,474.02. From the evidence, the Court finds that the attorneys' fees

payable under the Note and Chattel Mortgage are \$1,747.40, and that interest will accrue at the rate of 10% per annum on \$17,474.02 from and after July 1, 1958.

From the foregoing Findings of Fact, the Court makes the [19] following

Conclusions of Law

1. This Court has jurisdiction to determine the validity of the said Mortgage of Chattels as against the Creditors, the Bankruptcy Estate, and the Trustee in Bankruptcy herein.

2. The Mortgage of Chattels is valid and enforceable against Creditors, this Estate, and the Trustee in Bankruptcy herein.

3. The property covered by the Mortgage of Chattels, having been sold by Ralph Meyer, as Assignee for the benefit of Creditors herein, and the sale proceeds having been delivered to the Trustee in Bankruptcy herein, the lien created and evidenced by the said Mortgage of Chattels has attached to the funds in the hands of the Trustee herein which represent the proceeds of the sale of the fixtures, machinery and tooling equipment of the Bankrupt located at 224 East Palmer Avenue, Compton, California.

4. L. E. McIntyre and M. H. McIntyre, d/b/a L. E. McIntyre & Company, are entitled to an Order that they be paid from assets, consisting of cash, in the hands of the Trustee, the sum of \$17,474.02 principal, \$1,747.40, attorneys' fees, and

interest at 10% per annum on \$17,474.02 from and after July 1, 1958; provided, however, that the total amount so to be paid for principal, attorneys' fees and interest shall not exceed the proceeds of the sale of the property covered by the Chattel Mortgage less such expenses of sale as this Court may allow.

Having made the foregoing Findings of Fact and Conclusions of Law, the Court now makes the following

Order

It Is Hereby Ordered as follows:

1. The Petition of L. E. McIntyre and M. H. McIntyre, insofar as it requests that the Trustee be ordered to appear in and defend the state court action therein described, is denied. [20]

2. The relief prayed for in the Counterclaim of the Trustee is denied.

3. The Mortgage of Chattels executed by the Bankrupt in favor of L. E. McIntyre & Company, and recorded on June 14, 1956, in Book 51460, Page 320, Official Records of Los Angeles County, California, is valid and enforceable against the Creditors of the Bankrupt, this Bankruptcy Estate, and the Trustee herein, and the lien thereof be, and the same hereby is, transferred to the assets of the Bankruptcy Estate herein, consisting of cash, now in the hands of the Trustee as a first lien thereon.

4. The Trustee shall pay to L. E. McIntyre and M. H. McIntyre, d/b/a L. E. McIntyre & Company,

in payment of the Note secured by the Mortgage of Chattels referred to in the preceding paragraph, the sum of \$17,474.02 principal, \$1,747.40 attorneys' fees, and interest on \$17,474.02 from and after July 1, 1958; provided, however, that the total amount so to be paid for principal, attorneys' fees, and interest shall not exceed the proceeds of the sale of the property covered by the Chattel Mortgage less such expenses of sale as this Court may allow.

Dated this 27th day of May, 1958.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 27, 1958, Referee. [21]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF
REFEREE'S ORDER

To the Honorable Benno M. Brink, Referee in
Bankruptcy:

The petition of A. J. Bumb respectfully represents:

I.

That your petitioner is the duly elected, qualified and acting Trustee in Bankruptcy of the above-named bankrupt estate.

II.

That on the 27th day of May, 1958, an Order was made by the Referee herein, and filed in this Court, a copy whereof is hereto annexed marked Exhibit "A" and made a part hereof.

III.

Your petitioner being aggrieved by the said Order prays for a review thereof and complains that the Court committed error in making the said Order in the particulars as set forth in the following paragraphs.

IV.

The Referee erred in respect to said Order, in that the Referee's Finding of Fact No. 6 is clearly erroneous in that [23] said Finding 6 actually constitutes a conclusion, which conclusion is not supported by the evidence adduced at the hearing on said matter.

V.

The Referee erred in respect to said Order in that the Referee's Findings of Fact fail and omit to include a finding as to which of the items of furniture, fixtures and tooling equipment which were sold by Ralph Meyer, as Assignee for the benefit of creditors, were covered by the subject Chattel Mortgage.

VI.

The Referee erred in respect to said Order in that the Referee's Conclusion of Law No. 2 is clearly erroneous, in concluding that the subject Mortgage

is valid and enforceable against creditors, this estate, and the Trustee in Bankruptcy herein.

VII.

The Referee erred in respect to said Order, in that the Referee's Conclusions of Law Nos. 3 and 4 are clearly erroneous, each being based upon the erroneous conclusion that the subject Chattel Mortgage is valid and enforceable.

Wherefore your petitioner prays that said Order be reviewed by a Judge of this Court and that the Referee promptly prepare and transmit to the Clerk thereof his Certificate thereon, together with a statement of the questions presented and a transcript of the evidence taken at the hearing or a summary thereof and all exhibits therein offered.

Dated: May 28, 1958.

/s/ A. J. BUMB,
Trustee, Petitioner.

SHUTAN & FEINERMAN,
By /s/ ROBERT H. SHUTAN,
Attorneys for Petitioner.

[Endorsed]: Filed May 31, 1958, Referee. [24]
Affidavit of Service by Mail attached.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW OF ORDER RE CHATTEL
MORTGAGE

To the Honorable Ernest A. Tolin, Judge of the
Above-Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of said Court, before whom the above-entitled matter is pending under an order of general reference, do hereby certify to the following:

A. J. Bumb, the trustee herein, has duly filed his petition for the review of an order made in this matter by your Referee on May 27, 1958, and in which order your Referee ruled that the chattel mortgage hereinafter mentioned was valid and enforceable against the said trustee.

The Proceedings

The controversy which is here involved relates to a chattel mortgage which was given to L. E. McIntyre & Company by the bankrupt [31] and others on May 25, 1956. It is conceded that the said mortgage covered personal property owned by the bankrupt.

On August 13, 1957, the bankrupt made a general assignment for the benefit of creditors, to Ralph Meyer, who accepted the said assignment on August 19, 1957; during the course of the assign-

ment and prior to this bankruptcy the assignee sold all of the physical assets of the bankrupt, for the sum of \$28,775.00, free and clear of the aforesaid chattel mortgage; thereafter and prior to this bankruptcy McIntyre filed an action in the State Court for relief under the said mortgage; on October 29, 1957, a petition in involuntary bankruptcy was filed in this matter; on November 19, 1957, an order of adjudication was entered upon the said petition; on February 10, 1958, the assignee paid over all of the funds in his possession to the trustee in this matter.

On January 16, 1958, McIntyre filed herein a petition for an order to show cause requiring the trustee to show cause why he should not be substituted as a party defendant in the aforesaid State Court action in the place and stead of the bankrupt; an order to show cause was issued on the said petition, and on February 1, 1958, the trustee filed his answer and counterclaim in the premises; in his counterclaim the trustee asserted that the mortgage was unenforceable as against him upon several grounds; the principal ground of objection to the mortgage was that the description of the property mentioned in the mortgage was legally inadequate. Thereafter it was decided that the enforceability of the mortgage should be determined by this Court and not in the aforesaid State Court action; at the hearing which was had in this matter the trustee abandoned all of his objections to the mortgage excepting the one relating to the aforesaid

alleged inadequate description; at the conclusion of the hearing your Referee overruled the said objection [32] and held that the mortgage was valid and enforceable against the trustee of this estate; thereafter, on May 27, 1958, your Referee signed and filed his findings of fact, conclusions of law, and order in the matter, and it is from the said Order that this review is taken.

The Questions Presented

The questions presented by this review are these:

1. Does the record in this matter support your Referee's finding that the description of the property contained in the mortgage here in question is sufficiently definite to enable third parties, aided by inquiries which the instrument itself suggests, to identify the property covered by the mortgage?

2. Is paragraph 6 of your Referee's Findings of Fact a "Finding of Fact" or a "Conclusion of Law"? If it is a "Conclusion of Law," is it erroneous?

3. Should your Referee have made a finding specifying the particular mortgaged items of personal property which were sold by the assignee? (It appears that this point may not have been raised before your Referee. See letter of Robert H. Shutan dated March 24, 1958, and the proposed Findings of Fact, Conclusions of Law and Order re Chattel Mortgage therein mentioned.)

The Evidence

The evidence in this matter will be found in the Reporter's Transcripts and the Exhibits which are going up with this Certificate.

Referee's Findings of Fact and Conclusions of Law, and Order

The original of your Referee's Findings of Fact and [33] Conclusions of Law, and Order in this matter is herewith transmitted.

Papers Submitted

The following papers are transmitted herewith:

1. Petition for Order to Show Cause, filed Jan. 16, 1958.
2. Order to Show Cause, filed Jan. 16, 1958.
3. Answer to Petition and Counterclaim of Trustee, etc., filed Feb. 1, 1958.
4. Answer of L. E. McIntyre and M. H. McIntyre to Counterclaim, filed Feb. 13, 1958.
5. Order to Show Cause, filed Feb. 24, 1958.
6. Points and Authorities on behalf of L. E. McIntyre and M. H. McIntyre, etc., filed March 6, 1958.
7. Trustee's Points and Authorities, filed March 10, 1958.
8. Original of letter from Robert H. Shutan, dated March 24, 1958, and Proposed Findings of Fact, etc., filed March 25, 1958.
9. Stipulation, filed May 12, 1958.

10. Findings of Fact and Conclusions of Law, and Order, re Chattel Mortgage, filed May 27, 1958.

11. Petition for Review of Referee's Order.

12. Reporter's Transcript of Proceedings of March 10, 1958, filed Sept. 15, 1958.

13. Reporter's Transcript, Opinion of Referee, filed March 14, 1958.

14. McIntyre's Exhibits 1, 2, 3, 4 and 5.

Respectfully submitted this 7th day of October, 1958.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed October 7, 1958, U.S.D.C.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE AMENDING
REFEREE'S CERTIFICATE ON PETI-
TION FOR REVIEW OF ORDER RE
CHATTLE MORTGAGE

To the Honorable Ernest A. Tolin, Judge of the
Above-Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of the said Court, before whom the above-entitled matter is pending under an order of general reference, do hereby amend the Referee's Certificate on Petition for Review of Order re Chattel Mortgage which was filed in this proceeding on October 7, 1958, in the following particulars, to wit:

The statement made on lines 9 and 10 on page 2 of the said Certificate and which reads as follows:

“thereafter and prior to this bankruptcy McIntyre filed an action in the State Court for relief under the said mortgage”

is hereby deleted, and the following is hereby inserted in lieu thereof: [35]

“meanwhile, prior to the said sale, and prior to this bankruptcy, McIntyre filed an action in the State Court for relief under the said mortgage.”

Respectfully submitted this 20th day of October, 1958.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed Oct. 20, 1958, U.S.D.C. [36]

In the United States District Court for the Southern District of California, Central Division

In Bankruptcy No. 82,754—T

In the Matter of

AMPSCO PRODUCTS OF CALIFORNIA, INC.,
Bankrupt.

ORDER AFFIRMING REFEREE'S
DECISION RE CHATTEL MORTGAGE

The hearing on the Petition of the Trustee herein for Review of the Referee's Order herein, which

said Order is entitled "Findings of Fact and Conclusions of Law, and Order, Re Chattel Mortgage," dated May 27, 1958, having come on regularly for hearing before the Honorable Ernest A. Tolin, on the 9th day of February, 1959, Messrs. Shutan & Feinerman, by Robert H. Shutan, Esq., appearing as attorney for the Trustee, Petitioner on Review, and Messrs. Forster & Gemmill, by John G. Gemmill, Esq., appearing as attorney for L. E. McIntyre and M. H. McIntyre, doing business as L. E. McIntyre & Company, Respondents on Review, and the Court having considered the said Petition, the Referee's Certificate on Review dated October 7, 1958, the Transcript of Oral Proceedings, the Exhibits admitted in evidence by the Referee, and the said Findings of Fact and Conclusions of Law, and Order, together with all other papers and documents referred to in and transmitted with said Certificate, and the Court having considered counsels' Points and Authorities filed herein, and the Court having heard oral argument and taken the matter under submission, and [39] having decided the same in favor of Respondents on Review, and against the Petitioner on Review, and the Court being fully advised;

It Is Hereby Ordered, Adjudged, and Decreed that the "Petition for Review of Referee's Order," insofar as the same seeks a reversal of the decision of the Referee, be, and the same hereby is, denied;

It Is Further Ordered, Adjudged, and Decreed that the "Findings of Fact and Conclusions of

Law, and Order, Re Chattel Mortgage'' dated May 27, 1958, of Honorable Benno M. Brink, Referee in Bankruptcy herein, is hereby ratified, confirmed, and approved, and is adopted in full as the Findings of Fact, Conclusions of Law, and Order of this Court, and that the decision of the said Referee, embodied therein, be, and the same hereby is, affirmed as the decision of this Court.

Dated March 11, 1959.

/s/ ERNEST A. TOLIN,
United States District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 11, 1959, U.S.D.C.

Entered March 13, 1959. [40]

[Title of District Court and Cause.]

NOTICE OF APPEAL

A. J. Bumb, Trustee in Bankruptcy and petitioner on review in the above-entitled proceeding, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Affirming Referee's Decision re Chattel Mortgage entered in this action on March 13th, 1959.

Dated: April 9th, 1959.

SHUTAN and FEINERMAN,

By /s/ ROBERT H. SHUTAN,
Attorneys for Appellant
A. J. Bumb, Trustee.

[Endorsed]: Filed April 10, 1959. [42]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF
POINTS ON APPEAL

Comes now A. J. Bumb, Appellant and Trustee in Bankruptcy for the estate of Ampsco Products of California, Inc., a corporation, and presents herewith his points on which he intends to rely in support of his contention that the District Court erred:

1. The District Court erred in failing to reverse the Order of the Referee, dated May 27, 1958, and in affirming said Order.

2. The District Court erred in ratifying, confirming and approving the Findings of Fact and Conclusions of Law, and Order re Chattel Mortgage, dated May 27, 1958, of the Referee, and in adopting the same in full as the Findings of Fact, Conclusions of Law and Order of the District Court.

3. The District Court erred in respect to said Order, in that the Finding of Fact No. 6 (of the Referee and the District Court) is clearly erroneous in that said Finding 6 actually constitutes a conclusion, which conclusion is not supported by the evidence adduced at the hearing on said matter.

4. The District Court erred in respect to said Order, [48] in that the Findings of Fact (of the Referee and of the District Court) fail and omit to include a finding as to which of the items of furniture, fixtures and tooling equipment, which were sold by Ralph Meyer, as Assignee for the benefit of creditors, were covered by the subject chattel mortgage.

5. The District Court erred in respect to said Order, in that the Conclusion of Law No. 2 (of the Referee and of the District Court) is clearly erroneous, concluding that the subject mortgage was valid and enforceable against creditors, this estate, and the Trustee in Bankruptcy herein.

6. The District Court erred in respect to said Order, in that the Conclusions of Law Nos. 3 and 4 (of the Referee and of the District Court) are clearly erroneous, each being based upon the erroneous conclusion that the subject chattel mortgage is valid and enforceable.

Dated: June 19, 1959.

SHUTAN and FEINERMAN,

By /s/ ROBERT H. SHUTAN,

Attorneys for A. J. Bumb, Trustee in Bankruptcy
for the Estate of Ampsco Products of California, Inc., a Corporation, and Appellant.

[Endorsed]: Filed June 22, 1959. [49]

In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy No. 82754—T

In the Matter of

AMPSCO PRODUCTS OF CALIFORNIA.

Los Angeles, Calif., March 10, 1958

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Appearances:

For Trustee:

SHUTAN and FEINERMAN, by
ROBERT H. SHUTAN.

For L. E. McIntyre and M. H. McIntyre, etc.:

FORSTER & GEMMILL, by
JOHN G. GEMMILL.

For Harvey Aikins and Mrs. Harvey Aikins:

SIGFRIED LEVITT.

The Referee: Ampsco Products of California.

Mr. Shutan: Ready for the Trustee.

Mr. Gemmill: Ready, your Honor.

The Referee: Let us have the record clear as to what we are proceeding on. We have on our calendar today a continued hearing on the order to show cause issued January 16, 1958, on the petition of L. E. McIntyre and M. H. McIntyre, doing business

under the firm name and style of L. E. McIntyre & Company, the order to show cause requiring the Trustee to show cause why certain relief should not be granted.

Then we have the answer to that petition and a counterclaim by the Trustee, which was filed February 1, 1958. Then we have the order to show cause issued February 24, 1958, which brought into the proceeding Harvey Aikins, Mrs. Harvey Aikins, John E. Brodbeck and Mrs. John E. Brodbeck, and the Security-First National Bank of Los Angeles. Who appears for the McIntyres?

Mr. Gemmill: I do—John G. Gemmill.

The Referee: Who appears for the Trustee?

Mr. Shutan: Shutan & Feinerman.

The Referee: And for Mr. and Mrs. Aikins? Do you have an attorney?

Mr. Aikins: Yes; but he is not present.

The Referee: Is he coming?

Mr. Aikins: I assume so. [2*]

The Referee: The point is, should we wait for him?

Mr. Aikins: I understood somebody would be here this morning.

The Referee: Mr. and Mrs. Brodbeck, are they here?

(No response.)

The Referee: Are they represented?

(No response.)

The Referee: Security-First National Bank of Los Angeles?

(No response.)

The Referee: Is the Bank represented by counsel? The Bank, of course, cannot appear in propria persona.

Now, let's see what our issues are. The petition filed by the McIntyres asks that the Trustee be required to appear in a certain Superior Court action. I think that position has now been abandoned.

Mr. Gemmill: I understood the Court to rule that this Court would determine the validity of the chattel mortgage, to which I have no objection.

The Referee: Then we go to the answer and the counterclaim and cross-complaint of the Trustee.

He states that the chattel mortgage is unenforceable as against the Trustee; that from a reading of the mortgage it is impossible to determine with any particularity whatsoever what assets of the bankrupt corporation are allegedly subject to the chattel mortgage; and that the assets were sold. [3]

I assume that was done, but that does not decide the question of the validity of the mortgage; it is simply determining who is entitled to the proceeds of the sale, is that right?

Mr. Shutan: Yes.

The Referee: That is the only purpose of that allegation. Let's go down to the counterclaim (Reading):

“That said mortgage failed to comply with the requirements of the law as pertaining to

publishing notice of intention to execute a chattel mortgage, no such notice having been filed prior to the execution and recordation of such chattel mortgage.” [4]

The Referee: Well, Mr. Shutan, upon what allegation in your counterclaim could the Court sustain a conclusion that notice was necessary? Notice is not always necessary.

Mr. Shutan: There is no allegation in the counterclaim which relates to publishing of notice, but it seems to me that we put it into issues there by declaring it can be resolved by the statement which I wish to make the Court. We have been satisfied since the preparation of this counterclaim that the parties did publish a notice of intention in relation to this mortgage and did record such notice of intention, so that the Trustee is not going to belabor that point, and withdraws to that extent that part of that objection. There was a notice published and recorded in relation to this mortgage, and we are not challenging the ten-day period.

The Referee: All right. That disposes of that. Do you still rely upon your contention that there was undue and unreasonable delay in recording it?

Mr. Shutan: We rely on that in this limited sense—in count two of paragraph four that the mortgage, which is already before the Court, by way of an exhibit, speaks for itself—we make the contention that there was undue delay. In relation to those dates the Trustee does not intend to do

more than present the mortgage and the dates to the Court, and we will submit it on that basis. [5]

The Referee: All right. You still rely upon your contention that the description is insufficient?

Mr. Shutan: In essence that is the Trustee's case, and we very strongly urge that point.

The Referee: Miss Kendall, I presume you are interested because Mr. Meyer is assignee?

Miss Kendall: Yes.

The Referee: He was named as defendant in the State Court action?

Miss Kendall: Yes.

The Referee: Other relief is asked of Mr. Meyer other than he pay the amount of money represented by the mortgage?

Miss Kendall: That was it.

The Referee: Do you think it is necessary for Mr. Meyer to be represented by counsel?

Mr. Gemmill: I don't think it makes any real difference.

The Referee: If this Court determines the validity or non-validity of the mortgage I don't imagine you would press the matter in another suit against Mr. Meyer on the same set of facts. If we held your mortgage is not valid you would not go over to the Superior Court and attempt to prove it valid as against Mr. Meyer?

Mr. Gemmill: No, I don't think we could.

Miss Kendall: I will be glad to be excused. [6]

Mr. Gemmill: If it is held to be invalid I don't think Mr. Meyer is concerned about it.

The Referee: In any event, Mr. Meyer has been superseded by the Trustee.

Mr. Gemmill: I believe that is correct.

The Referee: Mr. Meyer has filed his account. If he has turned over everything to the Trustee there can be no cause of action against Mr. Meyer.

Mr. Gemmill: I think the only instance would be where the funds he turned over to the Trustee were not sufficient to discharge the mortgage. I think there was a conversion by Mr. Meyer in selling the mortgage. However, it is not an issue here.

The Referee: You did not allege it.

Mr. Gemmill: No, because at the time the court proceedings were commenced he had not sold it.

The Referee: Was this sale made after bankruptcy?

Miss Kendall: No. The property had been sold prior to the institution of the State Court proceeding, and after notice being given to Forster & Gemmill, and acknowledged by them of intent to sell—that had been accomplished.

Mr. Gemmill: That is not a correct statement. The notice to us was that they intended to take bids.

The Referee: Well, Miss Kendall, you exercise your own discretion and judgment as to whether or not Mr. Meyer's [7] interests require your presence here. Technically, I don't think Mr. Meyer is a party to the proceedings before this Court. I don't remember reading a supplemental order to show cause here that he was included as a respondent.

Miss Kendall: He was not, but I think he is a proper party.

The Referee: If you wish to intervene we will consider that.

Miss Kendall: No, I think Mr. Meyer's interests will be adequately protected by the statement of the gentleman.

The Referee: Please don't think the Court is trying to get rid of you. You are welcome to stay.

Miss Kendall: That is very kind. There are sufficient moneys to pay the mortgage in full and he will turn it over to the Trustee.

The Referee: All right.

(Miss Kendall leaves the court room.)

The Referee: I think that under the pleadings as they are constituted that counsel for the Trustee can go forward. Just a moment. Has counsel for Mr. and Mrs. Aikins come in?

Mr. Levitt: Yes, your Honor.

Mr. Shutan: Your Honor, with the copy of the chattel mortgage which is attached, I believe, to the [8] original petition of the McIntyres, and is before the Court in this proceeding, although I would like to double-check that——

The Referee: Well, just a moment—there is attached to the McIntyres' petition filed January 16, 1958, a photostat of a note dated May 25, 1956, and photostat of a mortgage of chattels dated May 25, 1956. All right.

Mr. Shutan: May I address counsel and ask if he wishes to enter into a stipulation that the Trus-

tee stipulates that a copy of the mortgage may be considered as evidence in this case?

Mr. Gemmill: I will so stipulate.

Mr. Shutan: The Trustee rests—a prima facie case.

The Referee: All right. Proceed.

Mr. Gemmill: Your Honor, I have obtained for counsel photostat copy of intended mortgage showing recorded date, and affidavit of publication of the intent to mortgage. He has stipulated with me that it may be stipulated that the photostated copy can be introduced without further foundation. Is that right?

Mr. Shutan: I have stipulated to a waiver of the foundation—yes, that part is correct.

Mr. Gemmill: I now offer in evidence photocopy of the original notice of intended mortgage, which is dated May 24, 1956, and shows on its face to have been recorded May 28, 1956, in Book 51301, page 310, Official Records [9] of Los Angeles County, California. I will offer that in evidence as McIntyre's Exhibit.

The Referee: McIntyre's Exhibit No. 1.

Mr. Shutan: I object to that—it now irrelevant.

The Referee: Objection overruled.

Mr. Gemmill: I now offer in evidence affidavit of publication executed by Dorothy Holt, under date of June 4, 1956, showing the publication of the notice of intended mortgage in the Compton Herald American and the Compton Herald.

Mr. Shutan: Objected to, on the same ground.

The Referee: Objection overruled. McIntyre's No. 2.

Mr. Gemmill: I subpoenaed certain documents from the escrow bank, and I understand that they have a representative here with the escrow file.

I will call Mr. Browning.

GARY BROWNING,

a witness called on behalf of petitioner, having been first duly sworn, testified as follows:

The Referee: Will you give us your name?

A. Gary Browning.

Direct Examination

By Mr. Gemmill:

Q. What is your business or occupation?

A. I am manager of the Broadway and Florence Branch of the Security-First National Bank.

Q. And you have some documents before you. What is the nature of them? [10]

A. The escrow file concerning this matter.

Q. And the number is what?

A. 129-5912.

Q. Who are the parties to the escrow?

A. Ampsco Products of California, and L. E. McIntyre & Company.

Mr. Gemmill: Counsel, in this escrow, among other things, are inventories which were initialed by Mr. McIntyre and Mr. Brodbeck and Mr. Aikins. I wonder if it may be stipulated that photostatic

(Testimony of Gary Browning.)

copy of the inventory may be substituted in place of the original, which I propose to offer? I am not asking for a stipulation that they be admitted—simply that they are photostatic copies which may be used in place of the original.

Mr. Shutan: I will stipulate to that extent, counsel.

Q. (By Mr. Gemmill): I call your attention to the several lists—the first is headed **Office Furniture and Fixtures**; next, **Inventory of Automatic Screw Machine Repair Parts and Tooling**; and, next, **Inventory of Inspection Equipment**; and I ask you if those documents are part of the escrow file in this matter.

Mr. Shutan: Objected to, immaterial and irrelevant as to the description of the mortgaged assets so far as it pertains to the Trustee in Bankruptcy.

The Referee: Objection overruled. The question is whether or not certain papers, or are certain papers part [11] of the escrow file. What is your answer?

A. Yes, sir; they are part of the escrow file.

Mr. Gemmill: I now offer in evidence, under the stipulation that photostats may be received in lieu of originals, the inventories which I have just referred to as McIntyre's next in order.

Mr. Shutan: I will object to the introduction of these lists of inventory as being irrelevant to the issues presented by the proceeding before the Court, which challenges the sufficiency of the description in the chattel mortgage, which inventory lists have

(Testimony of Gary Browning.)

been submitted into the escrow, assuming that it was. It does not relate to what notice was given to the creditors of the assets which are subject to chattel mortgage, and therefore is irrelevant to this proceeding.

The Referee: Mr. Shutan, the theory of the case as interpreted by counsel for McIntyre I think is quite clear—he is going to maintain that from the mortgage you go to the escrow, and in the escrow you find the detailed description of the items that are covered by the mortgage; and, so, all evidence in that connection is admissible; but then the Court's problem is to determine whether or not the entire transaction, taken as a whole comes within the provision of law with respect to adequate description of property. It is admissible, but what its effect will be we don't know. McIntyre's Exhibit No. 3. [12]

Mr. Gemmill: There were original escrow instructions. This file contained May 25, 1956, and an amendment, June 12, 1956, and also an amendment of June 12, 1956, is that correct?

A. Yes.

Mr. Gemmill: Under the stipulation, your Honor, the photostat may be received in lieu of the original—the original escrow instructions and two amendments, of the dates mentioned—I would like to offer those in evidence as McIntyre's next in order.

Mr. Shutan: I make the same objection—irrelevant and immaterial in relation to the issues.

(Testimony of Gary Browning.)

The Referee: Objection overruled. These instruments, photostats, are McIntyre's Exhibit No. 4.

Cross-Examination

By Mr. Shutan:

Q. Is this the entire escrow file? A. Yes.

Q. Which is the beginning?

A. They are chronologically arranged.

Q. Can you tell me from these papers the date that the escrow was opened?

A. May 25, 1956.

Q. And the date that the mortgage was recorded is what? I think we have that—June 14, 1956—is that correct?

Mr. Gemmill: That is the correct date. The file [13] would not necessarily show the recording date.

The Referee: The recording date is on the photostat of the mortgage, which is a part, by stipulation, of the record here.

Mr. Gemmill: That is correct.

The Referee: Were you in the escrow department of the office of the Security-First National Bank at the time of this transaction? Are you familiar with the transaction?

A. I did not handle the transaction. However, I am somewhat familiar with it, being manager of the branch at the time this escrow was handled.

Q. Have you handled a number of escrows involving chattel mortgages? A. Yes.

(Testimony of Gary Browning.)

Q. Does your bank have a general practice in relation to lists of inventory in relation to mortgages, for processing through your escrow department?

Mr. Gemmill: I don't think there is any detriment in that one way or the other, but I think we are getting into side issues and it is immaterial here as to the policy of the bank.

The Referee: Objection overruled. Let us see what he developes.

Q. (By Mr. Shutan): To make the question perhaps a little bit clearer, I am talking about the policy [14] as to whether or not lists of inventories are attached to the mortgage you send for recordation on behalf of the parties to the escrow.

A. It is the policy to have a list of the exhibits which they ask for in the escrow.

Q. Well, I notice, Mr. Browning, that in the original escrow instructions of May 25th, it states on line 38—"Copies of inventory of all personal property located at 224 East Palmer Avenue, Compton, California, to be handed you by borrower and approved by lender herein." According to previous testimony a copy of inventory was put in the escrow. If no other instructions had been given to you would you, in the ordinary course of your bank's escrow—would the bank have recorded the inventory list along with the mortgage?

A. If it had been attached and made part of the mortgage?

(Testimony of Gary Browning.)

Q. Your Bank prepared this chattel mortgage?

A. Yes.

Q. Would your Bank, on the basis of the original instructions, have attached a copy of the inventory list to such chattel mortgage, making it a part thereof?

A. I assume we would unless we were instructed otherwise.

Q. Well, then, let us look at this Exhibit No. 4, I believe, the amendment to the escrow instructions. It is [15] dated June 12, 1956. There are two of them. I am referring to the one that starts, "My previous instructions in the above-numbered escrow are hereby modified—supplemented in the following particulars only." Then it states: "You are not to attach a list of the inventory to the chattel mortgage being recorded, and the initials of borrower and lender on the copy of note and chattel mortgage being retained in your files constitute full approval of same."

If you had not received written instructions on that would you, in following your normal policy—would your bank have attached a list of inventory to the mortgage?

The Witness: "Normal policy" is a little difficult for me to say what it would be, inasmuch as I was not handling the escrow.

The Referee: Well, Mr. Witness, if you don't know you may say so. I would rather you did that than simply to guess at it.

(Testimony of Gary Browning.)

The Witness: I don't know.

Q. (By Mr. Shutan): All right. Now, I notice here a paragraph which reads as follows:

“You are hereby instructed not to file a new notice of intended mortgage on account of the mortgage not being held on the date specified in recorded notice of intended [16] mortgage, and your bank is relieved of all responsibility as to the validity, regularity and sufficiency of the proceeding and of the mortgage.”

From your examination of this file and from whatever familiarity you have with the matter, can you tell me—do you know why that was put in or to what it refers?

A. I assume it would refer to any liability we might have by not having this recorded at the correct time or at the time originally stated, because of some delay.

Q. What was the time it was supposed to be recorded—can you tell or can you point out to me in the original escrow instructions?

The Referee: The escrow instructions are in evidence, as McIntyre's Exhibit No. 4, and commencing on line 53, of page 1, we find:

“You will be handed a Notice of Intended Mortgage regarding said Chattel Mortgage. You will file said notice for record in the above-named County, at least ten days before the sale date named herein. Said notices shall

(Testimony of Gary Browning.)

provide for the sale, transfer, and assignment (and/or mortgage), and payment of the consideration on June 12, 1956, at 10:00 o'clock a.m. at the Escrow Department of the Broadway & Florence Branch of Security-First National Bank of Los Angeles, 7124 South Broadway Street, Los Angeles, California."

Mr. Shutan: These instructions were given to you [17] June 12th, which had been the date set by the original instructions for the execution of the mortgage and conclusion of the mortgage transaction, is that correct?

A. They are dated June 12th.

Q. And is it correct that no other notice of intention to mortgage was filed than the one which is McIntyre's Exhibit No. 1, here, is that correct?

A. I believe that is true. [17½]

Q. I see some correspondence here. There is a letter to R. G. Browning, Manager of Security-First National Bank—that is you? A. Yes.

Q. You were then and now are the manager?

A. Yes.

Q. I call your attention to an item in your escrow file. It appears to be a copy of form of transmission notice, to L. E. McIntyre, dated June 25, 1956, apparently a note for "twenty-seven five," and various policies. I see a personal property encumbrance guaranty, 453300. Was there a policy on this mortgage?

A. Offhand, I don't know what that is.

(Testimony of Gary Browning.)

Mr. Shutan: I have no further questions.

The Referee: Does anybody have any questions?

Mr. Gemmill: Yes.

Redirect Examination

By Mr. Gemmill:

Q. In response to a question on cross-examination you stated that you examined the provisions in the escrow instructions which said "Bank will not be responsible for failure to record in proper length of time." You stated you assumed that to be for the purpose which is stated there. As a matter of fact, you have no independent knowledge concerning any delay with respect to the recording of the chattel mortgage, do you? A. No. [18]

Q. The only things you know are what are shown in the file itself, is that correct?

A. Yes.

Mr. Gemmill: I have no further questions.

The Referee: Are there any questions?

Mr. Shutan: No, sir.

The Referee: All right. May Mr. Browning be excused?

Mr. Gemmill: Yes, so far as we are concerned.

Mr. Shutan: Yes, sir.

L. E. McINTYRE,

a witness, having been first duly sworn, testified as follows:

The Referee: I don't think you need prove the execution of the document. Is there any doubt about that?

Mr. Shutan: No. We are not challenging the execution.

Mr. Gemmill: These inventories were not executed. However, they were initialed. If Mr. Shutan will stipulate that the initials which appear on each of the inventories are the initials of Mr. McIntyre and Mr. Aikins and Mr. Brodbeck, being the managing officers of the bankrupt corporation, then I would be willing to forego establishing that fact.

Mr. Shutan: No, I cannot stipulate.

The Referee: All right. So far as the formal documents [19] are concerned, proof of execution may be given as to inventories. You may proceed.

Direct Examination

By Mr. Gemmill:

Q. Mr. McIntyre, I will show you McIntyre's Exhibit No. 3, and call your attention to the first page of that exhibit, which contains certain handwritten initials; and, also to the page therein Inventory of Inspection Equipment, which contain such initials; and to the sheet entitled "Office Furniture and Fixtures," which contains such initials. Now, in each instance, will you state whose initials appear first? A. My initials appear first.

(Testimony of L. E. McIntyre.)

Q. You placed those there while the documents were in escrow and before the close of the escrow?

A. Yes.

Q. Whose initials appear thereafter?

A. The second is J. E. Brodbeck; and the third is Mr. Aikins.

Q. Are you familiar with their handwriting and initials? A. I am.

Mr. Shutan: May it be deemed that I have a running objection to all questions relating to this inventory list, because I feel there has not been a proper foundation laid? I feel that all documents relating to the escrow itself, and particularly to the inventory list, are irrelevant and immaterial. If my objection is deemed [20] to be running it will save time.

The Referee: The record may show your objection to all questions concerning the escrow or in the escrow. The objection is overruled.

Mr. Gemmill: I have no further questions.

Recross-Examination

By Mr. Shutan:

Q. Well, Mr. McIntyre, what was the obligation secured by your chattel mortgage?

Mr. Gemmill: Your Honor, I think the document is the best evidence of that fact.

The Referee: Objection sustained; it is in evidence.

Mr. Shutan: I have no further questions.

The Referee: Any other questions?

Mr. Gemmill: I have no other questions.

The Referee: Let's take a recess.

(Whereupon a recess was taken, after which the following proceedings were had:)

The Referee: Well, as far as the delay in recording is concerned, I don't think you have got a case, because the mortgage is dated May 25, 1956; it was acknowledged by the officers of the mortgagor corporation. On June 8, 1956, there was a notice of intention filed, which made it impossible for the escrow to deliver that mortgage before June 12th, and it was recorded June 14th; and, so there was no delay there.

The one point that you abandoned you probably want [21] to talk about some more, and that is the question of the notice of intention, and that may be suggested by the last escrow instruction. Do you want to revive that?

Mr. Shutan: Yes. I would like to revive that because, frankly, it had not occurred to me until that evidence was produced that the transaction of the mortgage was not consummated on the date that the creditors were advised by the notice. I haven't researched that particular point.

The Referee: Then, if you are going to get back to that you get back to your own pleading, which would appear to be insufficient—your pleading does not bring this corporation within the type of persons or entities which are required to give notice.

Mr. Shutan: Well, I would ask leave to amend

the pleading to make that allegation, and the allegations contained in it would not contain any material which would surprise.

The Referee: What would you allege?

Mr. Shutan: That the bankrupt was engaged in a business which was within the requirements of the Code.

The Referee: What kind of business?

Mr. Shutan: A machine shop—a machinist.

The Referee: A machinist?

Mr. Shutan: Yes.

The Referee: That is one of the specified businesses? [22]

Mr. Shutan: Yes.

The Referee: All right. Let us assume that you amend or supplement and allege that the bankrupt at the time of the execution of the mortgage was a machinist, and let us assume that that brought you within section 3440.1 of the Civil Code, you would then be suggesting that the transaction just be consummated on the date mentioned in the notice; that there can be no delay beyond that date unless a new notice is given.

Mr. Shutan: That appears to be the only point I would have. As I indicated before, I am not prepared on that point today. I don't know whether I am sure that the cases will cover that particular point. I don't know whether they hold that a failure to close the deal on the date indicated in the notice is fatal to the validity of the execution of the mortgage.

The Referee: Just a moment. Section 3440.1, among other things, provides:

A mortgage of the fixtures or store equipment of a—machinist—will be conclusively presumed to be fraudulent and void as against the existing creditors of the mortgagor, unless at least ten days before the consummation of such mortgage—the intended—mortgagee shall record in the office of the county recorder in the county or counties in which said stock in trade, fixtures [23] or equipment are situated a notice of said intended—mortgage, stating the name and address of the intended mortgagor and of the intended mortgagee, and a general statement of the character of the merchandise or property intended to be—mortgaged, and the date when and the place where the purchase price or consideration, if any there be, is to be paid.”

As to the factual situation—on the date of June 12, 1956, there was an escrow instruction dated that day. Now, that is where the evidence stops. I don’t know what happened after that. I don’t know whether the deal was completed on June 12 or not. It does not say that the mortgage has to be recorded on June 12—the law does not say that; and, so, I don’t know. The mortgage was recorded June 14th. If the transaction was completed on June 12th and the mortgage recorded June 14th, as I point out, there would not be any unreasonable delay.

Mr. Shutan: I think the instruction of June

12th gave an overwhelming inference that the deal was not concluded on June 12th.

The Referee: You mean a suspicion?

Mr. Shutan: I would call it what I called it.

The Referee: Well, in this Court we do not invalidate otherwise valid liens upon either suspicion or an inference. It must be upon a preponderance of evidence.

Mr. Shutan: We have challenged the mortgage, and [24] there has been no evidence introduced that it was concluded on the day advertised. We may be talking about the burden of proof rather than the degree of inference. We have challenged and notified the mortgagee of our attack on the mortgage, and there has been no indication it was concluded on June 12th.

Mr. Gemmill: Your Honor, it is our position that it makes no difference whether or not the transaction was concluded on the 12th; nobody could possibly be hurt by the failure to do it on the 12th or 14th or a subsequent date as long as the Code was complied with—of giving notice of intended mortgage and thereby giving creditors an opportunity to come in and levy their attachments or put their claims in escrow. * * *

I would like to offer into evidence this escrow sheet. I do represent that this is a photostat copy of a photostat copy which was sent to me by the escrow department; and I ask counsel if he will waive formality of foundation.

Mr. Shutan: I will waive formality of foundation and not make any objection to it coming in at

this time, but I am not quite sure how it relates to the particular question that the Court has raised.

The Referee: Is there any objection?

Mr. Shutan: I will object on the ground that it is irrelevant to this particular issue. Frankly, I would waive [25] my objection if I could see in here that it would assist us.

The Referee: Objection overruled. This McIntyre's Exhibit No. 5.

Mr. Gemmill: Your Honor, I did not show that document to counsel.

The Referee: All right—take a look at it.

Mr. Shutan: I do not find on here a date that indicates date of preparation.

The Referee: You find various dates—on the lower right-hand corner you will find settlement date, June 11th.

Mr. Shutan: This document indicates that the mortgage was recorded on the 15th, but, actually, the mortgage bears the date of the 14th.

The Referee: That is right. Do you want to do anything, Mr. Shutan, on this point?

Mr. Shutan: Yes, your Honor, I would like an opportunity to submit to counsel and the Court—if the Trustee is going to press this point—a brief memorandum on the law.

The Referee: I will say to you now that I will overrule your contention simply on the ground that your pleading does not state a cause of action.

Mr. Shutan: Well, I had already assumed that I had gotten into the record my desire. [26]

The Referee: You had better make it formally.

Mr. Shutan: I formally move that the Trustee be permitted to amend the pleading, or that the pleading deemed to be amended.

The Referee: No.

Mr. Shutan: That the Trustee be permitted to amend the pleading to include the allegation that respondents, L. E. McIntyre, and so forth, the individuals doing business as a co-partnership, as named herein—that they were conducting a business—pardon me—that the bankrupt, Ampsco, was conducting a business within the terms and meaning of section 3440.1 of the Civil Code of California, in that such business was that of a machinist; and that under California law, and particularly section 3440.1 the parties to such chattel mortgage were required to file a notice of intention within the requirements of such section, and that they did not file a notice of intention which complied with their obligation under the statute; and that by virtue of their failure—the parties' failure, to comply with the statute the subject chattel mortgage is invalid, particularly against third parties, including the Trustee.

The Referee: Is there any objection to the motion to amend?

Mr. Gemmill: Yes, there is, your Honor. I take it that counsel is submitting an amendment which is designed [27] to conform to the proof. I think it is axiomatic that unless the proof is along the lines that the amendment proposed goes, then it is not proper to amend the pleadings. There is no evidence here whatsoever as to the business in which

the bankrupt is engaged. Furthermore and probably more seriously, the proposed amendment states a conclusion which is not consistent with the fact, namely, that there was not a compliance with section 3440.1 of the Civil Code. We contend that there was compliance with the letter, that is, the exact language of that section, namely, there must be a notice published within the number of days before the event occurs.

(Discussion.)

The Referee: Motion to amend is denied. You are attempting to proceed, Mr. Shutan, under a technical statute, you are attempting to invalidate a mortgage, purely on technical grounds, without any real reference to equity or justice. Whenever you come into court on a matter like that you are not entitled to any favors by the court at the expense of the other side. As counsel points out, you have no evidence as to the kind of a business this is, which would mean you would have to have a continuance and bring everybody back here. I am satisfied that under the circumstances of the case your motion to amend, in the particulars you have set forth, must be denied, and it is so denied. [28]

All right. Now, the Court will hold that the notice required by section 3440.1 of the intention to give the mortgage which was here given—that that notice was, in fact, given as required by the section, 3440.1.

Now we get down to the final, and what Mr. Shutan asserts is the big question, namely, that of

description. There is not any doubt at all as to what the law of California is.

(Discussion.) [29]

The Referee: I am ready to rule, gentlemen. The petition of the Trustee is overruled. There is no equity here, Mr. Shutan. This is just hard, tight-fisted law under the terms of which something may be taken away from a person who in good faith paid a valuable consideration for it purely upon the technicality of a statute. And, so, it is not a case which calls for the exercise of any equitable jurisdiction that the Court may have; and, as I have already indicated, by denying your motion to amend, this is the sort of a case where the moving party, or the plaintiff, must watch out for himself and not expect any special consideration from the Court.

On the other hand, of course, the Court must not permit any sympathy for the claimant or prejudice against the one who resists a claim to interfere with his judgment. He must decide it upon the facts and the law, whatever his private opinion of the law may be as he finds such facts and law to be in a given case.

Now, I overruled the Trustee's petition on two grounds—one—that the description as given on the mortgage it itself is self-sufficient—it is a description of the fixtures, machinery, tooling equipment located at the address given.

Now, as we have all been conceding all morning [30] long here. It is only the one word that was typed in here by the person who typed the mortgage

that give us any trouble at all. That is the word "certain."

Now, if, as Mr. Shutan has rhetorically inquired, it had said "some" or "part," then the Court's ruling on this point which we make simply for the purpose of identification, referred to as point one, would have to be different because there it would indicate something less than the whole. If it said "some" or a "portion" or a "part," thereof, there is some doubt as to the construction to be placed on this word "certain."

But I hold that in a technical statute such as we have here, and in a proceeding such as we have here, the doubt must be resolved in favor of the one who has the equitable side of the case, which in this case is the mortgagee.

Now, if we had a lawsuit where somebody had purchased some of the fixtures, machinery and equipment for an adequate consideration upon the advice, for instance, of an attorney that this mortgage by its terms did not cover the items purchased, then we would have a different equitable situation. But in a case such as we have here where this point has come up because of the filing of an involuntary petition in bankruptcy and the subsequent adjudication, which vested in the Trustee, the rights, remedies and powers of a lien of a creditor holding [31] a lien by legal or equitable proceeding, I hold that where doubt exists the mortgage should be resolved in favor of the mortgagee.

Now, this is the doubt—does the word "certain" mean "some" or does it in this case mean "all"?

We have the word "certain" twice. It says, "the Mortgagor mortgages to the Mortgagee all that certain personal property." Now, what is meant by that "certain"? That means all of the property described after the words "to wit," because it says he mortgages "all that certain personal property situated and described as follows, to wit." Of course, there you have the interposition of the word "all," and that tends, of course, to clarify the meaning of the word "certain." This word "certain" can mean, as I say, either a part or portion, or it can be a word of description, namely, it could mean and it could be the equivalent, even, of the word "the."

It could be read this way—"That the Mortgagor mortgages to the Mortgagee all that certain personal property situated and described as follows, to wit: the fixtures, machinery and tooling equipment located at 224 East Palmer Avenue."

Now, we have a lot of fine print in this mortgage, and among the fine print we find a paragraph that is designated by the letter "(1)." It reads: "That all additions, increases, repairs to, improvements and [32] replacements of said mortgaged property shall immediately become subject to the lien of this mortgage and to all the provisions thereof."

I have not taken time to read the rest of the fine print, but I will take it for granted that there is nothing in it that contradicts that particular paragraph. There may be something in it that would strengthen it.

Now, reading the whole mortgage together, as we have to do, isn't that almost proof conclusive

that when they used the word "certain" that they meant the fixtures, machinery and tooling equipment?

The only thing that will bother you there is the additional words "and located at 224 East Palmer Avenue, in the City of Compton, State of California." But I am satisfied that a construction that the mortgage covered all of the fixtures, machinery and tooling equipment at the address mentioned does not do violence to the language that is used, although some other construction might be possible from the language.

Now, point two. If there is any insufficiency of description, the exact description can be ascertained by information disclosed in the instrument itself.

I go a little farther than counsel, but I will go along with him as far as he goes. You have a very definite address—"224 East Palmer Avenue, in the City of Compton, State of California." An inquiry at that address [33] would have led to the escrow, and the escrow had the detailed description of the mortgaged property in its file, and that description is identified in the supplemental escrow instructions. This exhibit "McIntyre's No. 3" is captioned "Inventory," and the inventory is referred to in the supplemental instructions, so that you have the whole thing.

I say I go along as far as counsel goes, but I go farther. On behalf of the mortgagor the mortgage was executed by its president and its vice president, and inquiry at the address given would have led to one or the other or both of these men,

who, again, could have said, "There is an escrow and in that escrow you will find the detailed description."

I will take it for granted that findings are desired.
Mr. Shutan: Yes, your Honor.

[Endorsed]: Filed September 15, 1958. [34]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case; and that said items are the originals unless otherwise shown on this list:

A. Names and Addresses of Attorneys.

Petition for Order to Show Cause, filed 1/16/58.

Order to Show Cause, filed 1/16/58.

Answer to Petition and Counterclaim of Trustee, filed 2/1/58.

Answer of L. E. McIntyre and M. H. McIntyre to Counterclaim, filed 2/13/58.

Findings of Fact and Conclusions of Law and Order, Re Chattel Mortgage, filed 5/27/58.

Petition for Review of Referee's Order, filed 5/31/58.

Referee's Certificate on Petition for Review of Order Re Chattel Mortgage, filed 10/7/58.

Referee's Certificate Amending Referee's Certificate on Petition for Review of Order Re Chattel Mortgage, filed 10/20/58.

Minute Order 2/9/59 re hearing on petition on review.

Minute Order 3/3/59 re affirming ruling of Referee, etc.

Order Affirming Referee's Decision Re Chattel Mortgage, entered 3/13/59.

Notice of Appeal, filed 4/10/59.

Motion to extend time for filing record and docketing appeal and Order thereon, filed 5/20/59.

Designation of contents of record on appeal, filed 6/22/59.

Appellant's Statement of Points on Appeal, filed 6/22/59.

Appellees' Designation of additional items to be included in record on appeal, filed 6/25/59.

B. McIntyre Exhibits 3 and 4.

C. One volume of Reporter's Official Transcript of proceedings had on: March 10, 1958.

D. (Copy) Docket Entries.

Dated: June 26, 1959.

[Seal]

JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16515. United States Court of Appeals for the Ninth Circuit. A. J. Bumb, Trustee in Bankruptcy of the Estate of Ampsco Products of California, Inc., Bankrupt, Appellant, vs. L. E. McIntyre and M. H. McIntyre, Doing Business as L. E. McIntyre & Co., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed and Docketed: June 29, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

